

STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Mr. & Ms. Lemon" o/b/o "LL")	
)	
v.)	HRC. Case No. PA10-0010
)	
Washington NE Sup. Union)	
& Cabot School Dist.)	

FINAL DETERMINATION


Pursuant to 9 V.S.A. §4554, the Vermont Human Rights Commission enters the following Order:

1. The following vote was taken on a motion to find that there are reasonable grounds to believe that Washington NE Supervisory Union & Cabot School District discriminated against Mr. & Ms. Lemon" o/b/o "LL", in violation of 9 V.S.A. §4502 of the Vermont Fair Housing and Public Accommodations Act, by failing to take appropriate remedial action in response to "LL's" reports of sexual harassment in violation of 9 VSA §4502.

Joseph Benning, Chair	For <input checked="" type="checkbox"/>	Against <input type="checkbox"/>	Absent <input type="checkbox"/>	Recused <input type="checkbox"/>
Nathan Besio	For <input checked="" type="checkbox"/>	Against <input type="checkbox"/>	Absent <input type="checkbox"/>	Recused <input type="checkbox"/>
Shirley Boyd-Hill	For <input type="checkbox"/>	Against <input type="checkbox"/>	Absent <input checked="" type="checkbox"/>	Recused <input type="checkbox"/>
Mary Marzec-Gerrion	For <input checked="" type="checkbox"/>	Against <input type="checkbox"/>	Absent <input type="checkbox"/>	Recused <input type="checkbox"/>
Donald Vickers	For <input checked="" type="checkbox"/>	Against <input type="checkbox"/>	Absent <input type="checkbox"/>	Recused <input type="checkbox"/>
Entry: Reasonable Grounds <input checked="" type="checkbox"/> Motion failed				

Dated at Montpelier, Vermont, this 26th of August, 2010.

BY: HUMAN RIGHTS COMMISSION



Joseph Benning, Chair



Nathan Besio



Shirley Boyd-Hill



Mary Marzec-Gerrior



Donald Vickers

INVESTIGATIVE REPORT

HRC Case No.: PA10-0010

CHARGING PARTIES: "Mr. & Ms. Lemon" o/b/o "LL"

RESPONDENTS: Town of Cabot School District; Washington
Northeast Supervisory Union

CHARGE: public accommodation/ sex

SUMMARY OF CHARGE: In their Charge of Discrimination of February 5, 2010, "Mr. Lemon" and "Ms. Lemon" state that their minor daughter, "LL," was sexually harassed at the Cabot School through sexualized touching by another student at the school. "Mr. and Ms. Lemon" allege that the respondent school district and supervisory union failed to take appropriate remedial action in response to "LL's" reports of sexual harassment.

SUMMARY OF RESPONSE: In its response of March 8, 2010, respondents acknowledged that "LL" was the victim of sexual harassment, but denied that it had failed to take appropriate remedial action in response to "LL's" reports of sexual harassment.

PRELIMINARY RECOMMENDATIONS: This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Town of Cabot School District and the Washington Northeast Supervisory Union failed to take appropriate remedial action in response to "LL's" reports of sexual harassment in violation of 9 VSA §4502.

INTERVIEWS

- = Julie Bradshaw, 7/26/10
- = Roberta Garland, 7/29/10
- = Katie Johnson, 7/27/10
- = LL, 6/1/10
- = Mrs. Lemon, 6/1/10, 7/26/10
- = Sue Polen, 7/27/10
- = Regina Quinn, 7/13/10
- = Dave Schilling, 7/26/10
- = Richard Spaulding, 7/23/10
- = Student #1's foster mother, 7/27/10

DOCUMENTS

- = Behavioral Reports, 10/7/09, 11/2/09, 11/3/09, 11/9/09,
- = "Safety plans" of 10/22/09, 11/17/09, 1/6/10, 2/10, 4/1/10
- = Letters of Mr. Spaulding to Ms. Quinn, 10/12/09, 10/30/09, 1/4/10
- = Documentation of Mr. Spaulding 11/1/09, 11/2/09, 11/3/09, 1/13/10
- = Independent Review report, 1/8/10
- = Report card, 2/1/10
- = Letters from Ms. Quinn to parents of LL and alleged harasser, 10/19/09, 10/22/09
- = Letter from counselor Julie Bradshaw, 11/6/09
- = E-mails from Mr. Spaulding to Ms. Quinn, 12/7/09, 12/14/09, 1/11/10,
- = E-mails from Ms. Polen to Ms. Quinn, 12/7/09, 12/14/09, 1/13/10
- = E-mail from Ms. Quinn to Ms. Polen, 12/7/09
- = E-mail from Irene Harvey to Ms. Quinn, 12/8/09
- = E-mails from Mr. Spaulding to Superintendent Burlison, 1/5/10, 1/12/10
- = Charge of Discrimination, 2/5/10
- = Response to Charge of Discrimination, 3/8/10

CASE ELEMENTS

1. LL is a member of a protected class;
2. The Cabot School had actual knowledge of LL's allegations of harassment at school;
3. The Cabot School determined that harassment occurred but failed to take prompt and appropriate remedial action reasonably calculated to stop the harassment, and
4. The harassment had the purpose or effect of substantially undermining and detracting from or interfering with LL's educational performance or access to school resources or created an objectively intimidating, hostile, or offensive environment.

(Adapted from 16 VSA § 11(a)(26) and 16 VSA § 14(b).)

DESCRIPTIONS OF KEY PERSONS NAMED IN REPORT

- = **Julie Bradshaw** - LL's counselor – 1st mentioned in paragraph 40.
- = **George Burlison** - superintendent – 1st mentioned in paragraph 47.
- = **Katie Johnson** – VYCC instructor – 1st mentioned in paragraph 39.
- = **LL** – student victim of sexual harassment/ charging party – 1st mentioned in paragraph 1.
- = **Mrs. Lemon** – mother of student victim/ charging party – 1st mentioned in paragraph 1.
- = **Sue Polen** – guidance counselor – 1st mentioned in paragraph 9.
- = **Regina Quinn**– principal – 1st mentioned in paragraph 8.
- = **Dave Schilling**, 7/26/10 – 1st mentioned in paragraph 1.
- = **Dick Spaulding** – responsive interventionist – 1st mentioned in paragraph 7.
- = **Student #1** – student accused of harassing LL – 1st mentioned in paragraph 4.

I. FACTS¹

A. UNDISPUTED FACTS

The facts detailed in paragraphs 1- 6 below, are not disputed by the parties.

1. Mr. and Ms. Lemon are the parents of LL. "Lemon" is a pseudonym used in this investigative report to protect the identity of LL.

2. During the 2009-2010 academic year, LL was a 9th grade student at the Cabot School.

3. The Cabot School serves students from kindergarten through grade 12. Approximately 240 students attend the school.

4. During the 2009-2010 academic year, Student #1 was a 10th grade student at the Cabot School. Student #1 is a child in the custody of the Vermont Department for Children and Families (DCF). He is currently in a pre-adoptive foster care placement in a home located in the Town of Cabot. Student #1 receives special education services through the Cabot School.

¹ This investigation gathered much more evidence than that reported herein. With the intention of delivering this Investigative Report to the parties, providing them with the requisite opportunity to respond to the report and providing this Report along with the parties' responses to the Human Rights Commissioners before the beginning of the new academic year, the undersigned investigator drafted this report in a condensed fashion during the two days following the last witness interviews.

5. Student #1's foster mother has served as a substitute teacher and sports coach at the Cabot School for several years.

6. By her report to an instructor in the Vermont Youth Conservation Corps (VYCC) program at Cabot School on Wednesday October 7, 2009, LL alleged that Student #1 had sexually harassed her as follows:

> On Tuesday October 6, 2009, as LL sat in a classroom alongside Student #1 while students watched a video and the lights were off, Student #1 put his hand on LL's thigh near her groin. She pushed his hand away and he did it again. She pushed his hand away a second time and he did not do it again.

> LL attended a soccer game later on October 6. She walked away from the field and Student #1 followed her. Student #1 then pulled her to him by her belt, pinned her down on a picnic table in a supine position, then laid the full length and weight of his body on her. LL yelled "Get off of me," punched Student #1 and pushed to get him off of her. Student #1 then removed himself from atop LL. LL then jumped off the picnic table and walked swiftly away from Student #1 toward the soccer field.

> Immediately following the preceding incident, as LL walked toward the soccer field, Student #1 approached her from behind, wrapped his arms around her and grabbed the top of her thighs with both of his hands and began, in her words, "humping against me from behind with the front of him." LL wrested herself from Student #1 and ran to the soccer field.

> On the following day, Wednesday October 7, as LL reached into her locker between two class periods, Student #1 approached her from behind and, grabbing her buttocks stating, "I'll see you in the soccer field after school."

B. CABOT SCHOOL'S RESPONSE TO LL'S REPORT

7. The VYCC instructor to whom LL reported her allegations relayed LL's report to Cabot School's responsive interventionist Dick Spaulding at the end of the October 7, 2009 school day.

8. The following morning, Thursday October 8, Mr. Spaulding relayed LL's report to Cabot School principal Regina Quinn. Upon Student #1's arrival at school that morning, Mr. Spaulding and Ms. Quinn met with Student #1, along with his foster mother. After discussion among them, Student #1 and his foster mother decided that Student #1 would spend the remainder of that day at home.

9. Mr. Spaulding then met with Ms. Lemon and LL along with Sue Polen, Cabot School's guidance counselor. LL was given the options of going home, staying in school or going to a VYCC job site.² Given assurances that Student #1 would not be present, LL chose to go to the VYCC job site.

10. On Thursday October 8, Ms. Quinn assigned Mr. Spaulding to conduct an investigation of LL's allegations. At the end of that school day, Ms. Quinn decided it would be safest for both LL and Student #1 to remain at home the following day during the school's investigation

of LL's allegations.

11. On the afternoon of Friday October 9, with preliminary investigation information in hand, Ms. Quinn contacted the Vermont State Police to report LL's allegations. Asked by the individual who took her call whether the situation was an assault in progress, Ms. Quinn responded in the negative.

12. LL returned to school on Monday October 12. Student #1 did not return to school at that time.

13. Also on October 12, Ms. Quinn received a call from the Vermont State Police saying that the detective who would likely investigate LL's allegations was on vacation until the following day. Later that day, Mr. Spaulding reported his full investigatory findings to Ms. Quinn. Mr. Spaulding and Ms. Quinn determined that LL's allegations were credible and that Student #1's denials were not credible.

14. On Tuesday October 13, Ms. Quinn received a call from a Vermont State Police detective who indicated that Ms. Quinn should contact DCF so that a determination could be made whether that department or the State Police should investigate LL's allegations. Ms.

²Both LL and Student #1 were enrolled in a VYCC program offered at Cabot School.

Quinn contacted DCF.

15. Ms. Quinn heard nothing further from either the State Police or DCF. She received a second-hand report that LL's allegations would not be pursued by DCF and that the State Police had referred the matter to the States Attorney's office for guidance.

16. On October 19, 2009, Ms. Quinn sent letters to the families of Student #1 and LL notifying them of her determination that Student #1 was guilty of sexual harassment.

17. Also on October 19, the VYCC staff members at Cabot School determined that they would not be able to maintain a workable safety plan such that LL and Student #1 could both safely remain in the VYCC program at Cabot School. That day, guidance counselor Sue Polen began making arrangements for Student #1 to receive technical education at the Barre Technical Center.

18. On October 20, Student #1 returned to the Cabot School.³ An interim safety plan was implemented with the intention of having Student #1 avoid contact with LL on the school's property.

19. On October 22, Ms. Quinn developed a written safety plan intended to have Student #1 avoid contact with LL. Ms. Quinn mailed

³Cabot School classified his absence during the preceding school days as a disciplinary

copies of the plan to the parents of LL and Student #1.

20. The safety plan specified the movements of LL and Student #1 in the Cabot School during and between each period of the school day, detailing which doors each would enter, which staircases they should use, when and where they would have access to restrooms, etc.

21. The safety plan was initially developed by Ms. Polen with input from Mr. Spaulding. It was then submitted to Ms. Quinn who made some alterations and who then issued the written safety plan.

22. That first written safety plan was developed without input from the families of LL or Student #1. Additionally, school personnel did not consider alternatives to such written safety plan.

23. Cabot School was closed on Thursday and Friday October 22 and 23. The written safety plan was first implemented on Monday October 26, 2009.

24. On Monday October 26, Student #1 began a schedule that had him attend a first period class at Cabot School, then attend classes for several hours at Barre Technical Center, and then return to Cabot School for a class during the last period of the day.

suspension.

25. Student #1 temporarily ceased attending the Barre Technical Center on November 11, 2009 and returned to the Cabot School for his educational program.

26. On January 19, 2010, Student #1 resumed his program at Barre Technical Center and attended first and last period classes at Cabot School.

27. Starting at some time in late autumn 2009, Cabot School employed aides to accompany Student #1 during his time in the school for the purpose of enforcing the written safety plan.⁴

28. The families of LL and Student #1 expressed dissatisfaction with aspects of the initial written safety plan, to which Ms. Quinn responded by creating a second version issued on November 17, 2009. In response to additional complaints from the families, amendments were issued on January 6, 2010, Feb [date not specified] 2010, and April 2, 2010.

29. Since the incidents of October 6 and 7, 2009, Student #1 has engaged in no additional acts of touching LL in a sexualized manner.

⁴On July 15, 2010, this investigation requested that the respondents provide information about the amount of time aides were assigned to accompany Student #1. As this Investigative Report is being written, such information has not yet been provided. This investigation is unable at this

C. DEVIATIONS FROM SAFETY PLAN

30. Student #1 deviated from the written safety plan on numerous occasions, including during times that aides were assigned to accompany him. LL reported seeing Student #1 in locations prohibited by the plan on at least seven occasions (11/12/09, 11/17/09, 12/1/09, 12/8/09 x2, 12/10/09 x2). The documentary record indicates that school personnel reported observing Student #1 in locations prohibited by the plan on at least eleven additional occasions (10/30/09 x3, 11/2/09, 11/3/09, 11/9/09, 11/17/09, 12/3/09, 12/4/09, 12/7/09, 1/12/10). The record indicates that when asked about these deviations, on some such occasions Student #1 provided untruthful explanations, on some other occasions his responses were defiant, and on yet other such occasions he appeared confused about what the safety plan required of him.

31. LL stated to this investigation that when she reported observing Student #1 in locations prohibited by the plan it appeared that school personnel did not take effective responsive action, leading her to cease making such reports on a consistent basis.

time to report the duration of such accompaniment on any individual school day nor the duration

32. Both LL and school personnel reported that there were a few occasions when she deviated from the written safety plan. LL explained such deviations as resulting from either confusion about what was required of her or because of necessity (e.g., to retrieve something from her locker or to use the restroom). School personnel indicated that there may have been additional reasons for LL's occasional deviations including her desire to visit with friends.

33. Both LL and school personnel reported that on at least a few occasions when Student #1 deviated from the safety plan and LL and Student #1 were in visual contact, Student #1 gestured in an exaggerated manner as if to silently say something like, "Oh no! I'm not supposed to be here!" LL reported that on one or more such occasions Student #1 exclaimed "Oh shit!"

34. LL stated to this investigation that on most of the occasions when she observed Student #1 deviating from the safety plan, he was not accompanied by an adult.

D. IMPACT UPON LL OF SAFETY PLAN AND STUDENT

#1'S DEVIATIONS FROM SAFETY PLAN

such accompaniment in the 2009_2010 academic year.

35. LL stated to this investigation that the limitations on her movement imposed by the safety plans have limited her in many aspects of her school life including social contacts, ability to use the restroom, access to her locker, access to the cafeteria and access to the school nurse. She stated to this investigation that the plan "makes me feel I did something wrong." She stated further that the many times she observed Student #1 at school despite the safety plans it was "scary" for her because of the October incidents of his sexualized touching her and that on most occasions when she observed him deviating from the plan he was not accompanied by an adult. During the remainder of a school day after seeing Student #1, LL stated she felt "nervous" and found it "hard to focus."

36. LL provided this investigation with a handwritten statement which reads, in part:

After last year at Cabot School, I don't want to go back. It would be an understatement to say I feel unsafe there. After all that has happened, I feel that my ability to learn at Cabot was taken away, [sic] during the last year I couldn't focus in class or on any studying or school work. I was always more concerned about making sure that I followed my plan correctly, and wondering and worrying about, yet again, running into [Student #1]. The Principal would always say she was looking out for my best interest. But she wasn't. She said she was there to help me and ensure my safety. She wasn't and she didn't. There was just no possible way she was thinking of me. She along with other staff re-victimized me many times making me feel that I

had done something wrong. I was givin [sic] a plan making it so that I had to be in a certain place at a certain time ... this made it so that I had zero use to [sic] my locker, I couldn't go to breakfast and was not allowed in the hallways. I had to walk certain ways to my class which was opposite to my friends. I felt like everything was wrong and it hurt to know I couldn't even trust many teachers anymore or carry on a normal school life ...

With a new principal⁵ I am hoping this next year will be better. I hope she can help smooth things over and make me feel safe again, although I am still very worried things this year could be the same as last and that she will not be any help at all. I would love to have my ensured safty [sic] back, and to be able to go through a school year like any other kid at the school ...

37. LL's mother, Ms. Lemon, reported to this investigation that after the incidents of harassment LL did not sleep or eat well and she lost weight. This continued during the remainder of the school year.

38. Ms. Lemon provided this investigation with LL's report card of February 1, 2010 and noted that her grades had dropped significantly in several classes. Ms. Lemon attributed LL's falling grades to continuing trauma LL experienced during her school days resulting from a safety plan that Ms. Lemon believes was ineffective and that victimized LL by restricting her movements. Ms. Lemon also

⁵Regina Quinn has resigned as Cabot School's principal, and a new principal, Karen Stewart, has been hired to replace Ms. Quinn.

asserted that LL's absences from school were higher during the 2009-2010 school year compared to previous years, and she attributed such increased absences to the same alleged continuing trauma.

Principal Regina Quinn countered Ms. Lemon's statements regarding LL's grades and attendance saying that, reviewing LL's 7th and 8th grade report cards, it appeared that LL displayed a pattern of lower grades in the middle of each academic year, and that like those prior years, LL's grades picked up at the end of the 2009-2010 school year. Ms. Quinn added that LL's attendance has been similar during 7th, 8th and 9th grades.

39. One of LL's VYCC instructors, Katie Johnson, stated to this investigation that on several occasions while LL was in her classroom, LL informed her that she observed Student #1 through a classroom window. On those occasions, LL became agitated, expressed concern and lost focus on the VYCC class work. Ms. Johnson noted that LL's expressions of concern were "not as dramatic as I would expect from a high schooler," but were expressed in a more straightforward manner and appeared sincere rather than exaggerated. Ms. Johnson stated that on such occasions LL was clearly distracted and stared at or through the window where she had spotted Student #1 for 20 or 30

minutes. Ms. Johnson stated that she and the other VYCC instructor, Dave Schilling, learned that at such times they could help re-focus LL by directing her to move to a different location so she would be facing a different direction.

40. Between October 19, 2009 and February 15, 2010, LL attended eight counseling sessions with Julie Bradshaw, LCSW (Licensed Clinical Social Worker). In a November 6, 2009 letter, Ms. Bradshaw stated that LL showed "many signs and symptoms of Post-Traumatic Stress Disorder (DSM Code 309.81)" related to the incidents of sexualized touching by Student #1. The letter went on to say in pertinent part:

Despite a safety plan at the school, [LL] has been exposed to the accused in this case. It is clear to me that her symptoms have worsened when this contact has occurred.

Based upon this information and my professional opinion, it is not in this child's best interests to have any contact with the accused in this case. I support any protections that could be put in place in order to prevent any further contact.

Ms. Bradshaw stated to this investigation that on or about November 6, 2009 she hand-delivered a copy of this letter to Cabot School guidance counselor Sue Polen. At that time, Ms. Bradshaw stated to Ms. Polen that she advised that the school prevent all contact between LL and Student #1 including visual contact. In her interview with this

investigation, Ms. Polen acknowledged that Ms. Bradshaw had advised that the school prevent all such contact including visual contact. Ms. Polen also stated that, following this discussion, she relayed Ms. Bradshaw's advice regarding visual contact to Regina Quinn.

Ms. Bradshaw also stated to this investigation that the Cabot School's safety plan had a significant negative impact on LL. In Ms. Bradshaw's opinion, LL justifiably felt re-victimized by the restrictions of her movements within the school. According to Ms. Bradshaw, the school was "pushing the limits" to arrange such a plan for a child who had been assaulted. Ms. Bradshaw added that LL's reports that she continued to have periodic visual contact with Student #1 despite imposition of the safety plan clearly reinforced LL's feelings of being unsafe within the school.

E. STUDENT #1'S FOSTER MOTHER

41. As noted above, Student #1's foster mother served Cabot School as a substitute teacher and sports coach. LL alleged that she was justifiably intimidated by Student #1's foster mother based on her following allegations:

1. At a November 9, 2009 hearing in Washington Superior Court at which LL, through her parents, requested that the court order Student #1 to stay at least 100 feet from LL at all times, Student #1's foster mother allegedly made statements

disparaging LL's reputation.

2. At the end of that hearing, LL and her family waited for Student #1 and his foster parents to exit before exiting themselves. As LL and her family then exited the court building, they were surprised to see Student #1 and his foster parents pressed against the outside wall of the building, as though they were intending to hide themselves from sight until LL and her parents exited. At that time LL heard Student #1's foster parents saying "Good job [Student #1]" and making other complimentary remarks to him.

3. On several occasions as LL walked near Student #1's foster mother on Cabot School premises, the foster mother made angry faces at her.

4. In November or December 2009, as LL walked along a hallway in Cabot School, Student #1's foster mother intentionally pushed LL with her shoulder.

Ms. Lemon made statements to this investigation consistent with LL's two allegations regarding the conduct of Student #1 and his foster parents at the courthouse. No corroborating witnesses were identified regarding LL's allegations regarding the conduct of Student #1's foster mother on Cabot School premises.

42. During her interview with this investigation, Student #1's foster mother denied each of LL's four allegations about her.

43. Because of LL's expressed feeling of being intimidated by Student #1's foster mother, LL declined to attend classes in which

Student #1's foster mother served as substitute teacher. According to Ms. Lemon, during a telephone conversation with Regina Quinn about this matter, Ms. Quinn provided Ms. Lemon with three options for those class periods: LL could attend the class taught by the foster mother, LL could receive the class materials and review them in the school library, or LL could go home. Ms. Lemon chose the library option. However, Ms. Lemon stated to this investigation that she was unhappy with that option because it left LL without instruction regarding the class materials.

44. Ms. Quinn disputes Ms. Lemon's account of their conversation saying that the three options she offered LL included receiving individual instruction on the subject matter and did not include the option of going home.

45. Although LL wished to join the softball team during the spring of 2010, she declined to do so because Student #1's foster mother was serving as the team's coach.

46. It is the position of LL and her parents that she was constructively barred from attending the classes in which the foster mother served as substitute teacher and from participating in the softball team.

F. CABOT SCHOOL'S HANDLING OF OTHER ALLEGATIONS

AGAINST STUDENT #1

47. A January 5, 2010 letter from Cabot School's responsive interventionist Dick Spaulding to Washington Northeast Supervisory Union's superintendent George Burlison stated in pertinent part:⁶

I have ... been expressing my concerns for weeks to you ... and to Regina [Quinn] that we are not providing a safe learning environment for not only [LL] but also [Student #2] who reported that he was being threatened by [Student #1] in early December, and for [Student #3] who reported on [the] 15th that she was being racially harassed by [Student #1] ... The only contact I had with you prior to the break, and concerning [Student #1], was when I called to inform you of the racial harassment allegations. You told me that it was a new incident and I should follow the policy in investigating it. I did this, interviewing a number of student and adults and found that the allegations were substantiated. I was then contacted several times by you ... to tell me to take no action until you ... approved it. I had assumed that you were waiting for a meeting with BTC [Barre Technical Center] to take place on Friday 12/18 but have still I heard [sic] nothing from any one concerning this.

On Thursday 12/17 I met with Sue and Becky prior to a meeting you were to have with Becky. At that meeting we asked Becky to share with you our great concern that no action has been taken for serious harassment allegations that were found to be substantiated and that nothing official had been done to protect [Student #2] or [Student #3] from further harassment or threats. We also stated that [LL] was not being protected to the

⁶This letter and several other documents from Dick Spaulding's file were provided to this investigation on July 27, 2010, several days after the interview with Mr. Spaulding. Unfortunately, this investigation did not have an opportunity to ask Mr. Spaulding about this letter.

requirements of our policy or the law ... On Friday I met with Regina and reviewed my concern for all the same issues discussed with Becky the day previous, especially that [Student #1] had not even been interviewed on either the [Student #2] threat allegations or the [Student #3] racial harassment allegations. I reminded her that [Student #2] was suspended and out of the school within the hour for using the words "nigger" and "nig nag" to his foster brother and that although [Student #1] had used the words "nigger" and "the n-word" in the presence of, and toward [Student #3], an African American student, for in her belief the purpose of harassing her. [sic] In spite of the fact that this was done repeatedly and in front of both student and adult witnesses, he remained and remains un-interviewed, unaffected by his actions, and that the three students affected by his behavior remained unprotected.

* * * *

... I have observed that [Student #1] acts with impunity and that few ever report his actions or call him on where he is or what he does. I will often hear nothing until perhaps VYCC gives me a packet of documentation of incidents that deviate from the other safety plans but for which no investigation or action is taken.

The remainder of this letter indicates that, as of the date of its writing, no school action had been taken to address the alleged threats made by Student #1 or the racial harassment that had been substantiated. Mr. Spaulding also expressed frustration that he was not given the authority to take action in these matters himself.

II. ANALYSIS

9 VSA §4502(a) of the Vermont Fair Housing and Public

Accommodation Act (VFHPA) provides:

An owner or operator of a place of public accommodation or an agent or employee of such owner or operator shall not, because of the . . . sexual orientation . . . of any person, refuse, withhold from or deny to that person any of the accommodations, advantages, facilities and privileges of the place of public accommodation.

Pursuant to 9 VSA §4501(1), a school is a place of public accommodation.

Harassment is defined as follows under 16 VSA §11(26)(A):

"Harassment" means an incident or incidents of verbal, written, visual, or physical conduct based on or motivated by a student's or a student's family member's actual or perceived race, creed, color, national origin, marital status, sex, sexual orientation, or disability that has the purpose or effect of objectively and substantially undermining and detracting from or interfering with a student's educational performance or access to school resources or creating an objectively intimidating, hostile, or offensive environment.

School harassment cases are explicitly linked to the VFHPA by 16 VSA §14(b). This section also specifies schools' duties in instances when they determine harassment has occurred, as follows:

In regard to claims brought pursuant to 9 VSA chapter 139 [VFHPA], if after notice, the educational institution finds that the alleged conduct occurred and that it constitutes harassment, the educational institution shall take prompt and appropriate remedial action reasonably calculated to stop the harassment.

In the instant matter, Cabot School determined that Student #1 sexually harassed LL. Mr. and Ms. Lemon, on behalf of LL, allege that respondents failed to take appropriate remedial action in response to the substantiated incidents of sexual harassment.

A. ELEMENTS of PROOF

To make a case that the respondents violated 16 VSA §14(b) and thereby violated VFHPA, the charging parties must first show by a preponderance of the evidence that:

1. LL is a member of a protected class;
2. The Cabot School had actual knowledge of LL's allegations of harassment at school;
3. The Cabot School determined that harassment occurred but failed to take prompt and appropriate remedial action reasonably calculated to stop the harassment, and
4. The harassment had the purpose or effect of substantially undermining and detracting from or interfering with LL's educational performance or access to school resources or created an objectively intimidating, hostile, or offensive environment.

Adapted from 16 VSA § 11(a)(26) and 16 VSA § 14(b).

The charging parties' burden of establishing these elements of proof is "a relatively light one." Carpenter v. Central Vermont Medical Center, 170 VT. 565, 566 (1999). If the charging parties successfully

establish the case elements, the burden then shifts to the respondents to "offer a legitimate, non-discriminatory reason for their acts and omissions. If the respondents articulate such a reason, the charging parties then have the opportunity to show that the proffered reason is pretextual. Id.

B. DISCUSSION OF ELEMENTS

1. Protected category

In this matter, LL alleges that she was the victim of sexual harassment by means of sexualized touching. There can be no reasonable dispute -- LL clearly comes within the protected category of sex.

2. Respondents' knowledge

There is no dispute that respondents had actual knowledge of LL's October 2007 report of harassment. Additionally, there is no dispute that respondents knew of numerous reports after October 2009 that LL was in visual contact with Student #1 on school premises.

3. Appropriate remedial action

The third element the charging parties must prove is that "Cabot School determined that harassment occurred but failed to take prompt and appropriate remedial action reasonably calculated to stop the harassment." Taking each aspect of this third element in turn -- there is no dispute that the Cabot School determined that LL was the victim of sexual harassment by Student #1. There is also no dispute that the remedial measures taken by the Cabot School were taken promptly, and that LL was no longer subjected to sexualized touching by Student #1. The heart of this dispute is whether the remedial measures taken by the respondents were "appropriate," as required by 16 VSA § 14(b).

This investigation believes that the overwhelming weight of the evidence indicates that the safety plans as implemented by the Cabot School were both ineffective and intrinsically inappropriate. The numerous documented instances of Student #1 deviating from the plans over a period of months (and the suggestion by LL that there were additional unreported instances) provide ample proof of the plans' ineffectiveness. The inappropriateness of the plans is shown by the clear proof that such deviations repeatedly re-traumatized LL.

The safety plans were inappropriate for an additional reason - regardless of intention, their impact upon LL was to impose restrictions upon her because she reported the harassment. LL gave voice to the inevitable subjective result of such restrictions - she felt she was being punished for being the victim of sexual harassment. An analogous situation arose in an employment case, Ellison v. Brady, 924 F.2d 872 (5th Cir. 1991), in which the Fifth Circuit stated,

We strongly believe that the victim of sexual harassment should not be punished for the conduct of the harasser ... [A] victim of sexual harassment should not have to work in a less desirable location as a result of an employer's remedy for sexual harassment.

Id. at 882-883. The Fifth Circuit stated further,

If harassers are not removed from the workplace when their mere presence creates a hostile environment, employers have not fully remedied the harassment. When employers cannot schedule harassers to work at another location or during different hours, employers may have to dismiss employees whose mere presence creates a hostile environment.

Id. at footnote 19.

Even if the word "appropriate" were missing from the statute, this investigation believes respondents would nonetheless be in violation of such hypothetical 16 VSA §14(b) because here the perpetrator continued to engage in a form of harassment.

Respondents argue that because the sexualized touching ended, Cabot School met its mandate to take "action reasonably calculated to stop the harassment." 16 VSA §14(b). Respondents' argument has some merit -- under a strict reading of §14(b), the final two words, "the harassment," could be deemed to refer only to recurrences of the same type of harassment. However, it would make no sense for a school to take an action that effectively eliminated one form of harassment without addressing other ways a perpetrator could attempt to further assert dominance over his victim. Such a strict reading of the statute would clearly lead to absurd results, such as making it difficult to prevent serial forms of harassment. This investigation believes it unlikely the Legislature would intend such a result. Braun v. Bd. of Dental Exam'rs, 167 Vt. 110, 117 (1997) ("We presume that the Legislature does not intend an interpretation that would lead to absurd or irrational consequences."); In re Southview Assocs., 153 Vt. 171, 175 (1989) (avoiding statutory construction "that would render the legislation ineffective or irrational").

Additionally, as a remedial statute, §14(b) must be interpreted liberally to advance the Legislature's intended remedy. Dep't of Corr. v. Human Rights Comm'n, 181 Vt. 225, 236 (2006). Here, Student

#1 initially sought to assert his dominance over LL via forceful sexualized touching. Afterward, when he was being monitored a little more closely, Student #1 asserted his dominance by willful deviations of the safety plan. When LL observed such deviations she reasonably feared she was at risk at school because Student #1 had successfully evaded the control of school personnel. It is likely that Student #1 knew that his very presence would intimidate LL. Whether his intention was to intimidate her or if he disregarded the likely impact on LL is irrelevant -- his actions met the definition of harassment in 16 VSA §11(26)(A): by placing himself in locations where he could be observed by LL, Student #1 engaged in "visual ... conduct based on or motivated by [LL's protected category] that has the purpose or effect of ... creating an objectively intimidating, hostile, or offensive environment." (Emphasis added.) While Cabot School may have effectively stopped Student #1 from continuing to touch LL sexually, it did not stop him from engaging in harassing visual conduct over a period of months.

4. Impact of the harassment

This investigation believes the charging parties have met the

fourth element of proof. Because the respondents substantiated LL's October 7, 2009 allegations of sexual touching, there is no dispute regarding the fourth element as applied to that incident. This investigation additionally believes that the evidence shows that Student #1's harassing visual conduct toward LL after October 2009 "had the purpose or effect of substantially undermining and detracting from or interfering with LL's educational performance or access to school resources or created an objectively intimidating, hostile, or offensive environment."

C. ALLEGATIONS REGARDING STUDENT #1'S FOSTER MOTHER

This investigation has no reason to doubt LL's sincere subjective impression that Student #1's foster mother intentionally sought to intimidate her. However, this investigation believes that there is insufficient objective evidence to show intentional intimidation.

This investigation notes, however, that by choosing to hire Student #1's foster mother to serve as substitute teacher for LL's classes as well as coach for the softball team, the respondents may have been callous toward LL during a particularly vulnerable time for

her. This investigation does not make a recommendation whether the school's employment of the foster mother constructively barred LL from some of her classes and from the softball team by dint of the foster mother's relationship to Student #1. This investigation, however, requests that the Human Rights Commissioners consider whether hiring Student #1's foster mother could, in itself, constitute such a constructive bar for LL.

D. RESPONDENTS' ASSERTED LEGITIMATE NON-DISCRIMINATORY REASONS

The charging parties successfully established the four case elements. Therefore, the burden shifts to respondents to offer a legitimate, non-discriminatory reason for their acts and omissions.

The respondents assert that, because Student #1 is a special education student with an IEP, their options are limited. Even a cursory review of federal and state special education law shows that, so long as a school follows certain procedures, it is free to take reasonable measures to protect other students and staff from assaultive and harassing behaviors of students receiving special education services. In this case, such measures might have included

finding an educational placement for Student #1 away from Cabot School. Another such measure might have been for Cabot School staff to closely accompany Student #1 at all times and to do so effectively, thereby assuring LL that she was safe at school.

E. CONCLUSIONS

This investigation believes that the charging parties have met their burden regarding all four elements of proof and that the respondents have not provided a legitimate non-discriminatory reason for their actions. Additionally, the January 5, 2010 letter from Cabot School's responsive interventionist Dick Spaulding to superintendent George Burlison suggests that the respondents may have engaged in a pattern of failing to comply with Vermont's statutory mandates regarding harassment. This investigation regrets that it did not have a greater opportunity to delve into this aspect of the investigation. However, given the impending start of the new academic year, this investigation believes an Investigatory Report should be presented to the Human Rights Commissioners at the earliest possible date.⁷

⁷ Because of the limited window of time, this investigation also did not have sufficient opportunity to explore an allegation by Mr. and Ms. Lemon that the Cabot School failed to provide them with the school's files regarding LL. On July 16, 2010, this investigation requested

PRELIMINARY RECOMMENDATION: This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that the Town of Cabot School District and the Washington Northeast Supervisory Union failed to take appropriate remedial action in response to “LL’s” reports of sexual harassment in violation of 9 VSA §4502.

Paul Erlbaum
Investigator

APPROVED:

Robert Appel
Executive Director

Date

that respondents answer two questions: 1) Why did Cabot School fail to provide LL's files to Ms. Lemon following her request in March 2010?, and 2) Are the Lemons being treated differently than other school families (i.e., is there always this much delay providing records to families)? The respondents have not yet provided this investigation with responses to these questions.